FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 289

DAN S. MARTIN, JR.,

Petitioner,

vs.

ESTHER R. WAGNER, AS EXECUTRIX OF THE ESTATE OF ZOE R. MARTIN, DECEASED, JOHN D. MARTIN AND DAN S. MARTIN, SR.

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

ERLE PETTUS,
Counsel for Petitioner.

JACKSON, RIVES & PETTUS,
Of Counsel.

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PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Petition for Certiorari

Your petitioner, Dan S. Martin, Jr. of Birmingham, Alabama, respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Alabama to review, revise and reverse that certain final judgment and decision of the Supreme Court of Alabama in the case of Dan S. Martin, Jr., appellant, versus Esther R. Wagner as Executrix of the Estate of Zoe R. Martin, deceased, et al., appellees, rendered on March 7,

1946, upon which the appellant's motion for rehearing in said cause in the Supreme Court of Alabama was by final judgment in that Court overruled and disallowed on the 11th day of April 1946. (Certified Transcript of Proceedings from the Supreme Court of Alabama is filed herewith.)

Summary Statement of the Matter Involved

On January 15, 1945, petitioner, Dan S. Martin, Jr. filed in the Probate Court of Jefferson County, Alabama, a court of competent jurisdiction, a petition to probate the lost will of his deceased uncle, W. C. Martin.

A lost will may be probated in whole or in part under Alabama law.

The petition averred that petitioner was then in the Armed Services of the United States; that W. C. Martin, a resident of Jefferson County, Alabama, departed this life in said county on the 18th day of July 1940, leaving a last will and testament duly signed and published by him and attested by two competent witnesses, then residents of the County, who subscribed their respective names to said will; and averring the name of one of said witnesses as Val J. Nesbitt, decedent's attorney; that the next of kin of the decedent at the time of his death were his widow, Zoe Rhode Martin; a brother, John D. Martin of Eufala, Alabama; and a brother Dan S. Martin, Sr. of Birmingham, Alabama, each over the age of 21 years; and petitioner was named as a legatee in said will; that the said will was a valid and subsisting will at the time of the death of the said W. C. Martin; and that the said will had been lost or destroyed after the death of the said W. C. Martin, testator.

The petition in the Probate Court further averred that W. C. Martin left no children, but left a widow whose name was Zoe Rhode Martin, who was deceased at the time his

petition was filed in the Probate Court for the probate of the lost will; and that Esther Wagner had been duly appointed and had qualified as Executrix of the estate of Zoe Rhode Martin, deceased.

The petition in the Probate Court further averred that said will was duly executed and had never been revoked by the testator; and set out and averred substantially the contents of the said lost will as follows:

> A. All of the real estate owned by the said decedent, consisting mainly of the old home place located in Clio, Barber County, Alabama, was devised equally to Dan S. Martin and John D. Martin, brothers of the testator;
>
> B. That all of the income from the stock and bonds and personal property owned by the said W. C. Martin or Will C. Martin at the time of his death was bequeathed to his wife, Zoe Rhode Martin; and that all of said stock and bonds and personal property at her death were bequeathed to your petitioner, Dan S. Martin, Jr. to the extent of a one-fourth interest therein; and to Sylvia Forbes, a niece of said Mrs. Zoe Rhode Martin, to the extent of a one-fourth interest; and to Katherine Isabel Martin, a niece of the decedent, to the extent of a one-fourth interest; and the remaining one-fourth interest to Zoe Rhode Martin, sister of petitioner; it being stipulated in substance that upon the death of the said Mrs. Zoe Rhode Martin, the widow, all of said stocks and bonds and all personal property owned by the said Will C. Martin at the time of his death were to be left in equal parts to your petitioner, Dan S. Martin, Jr., Sylvia Forbes, Katherine Isabel Martin and Zoe Rhode Martin, the latter a sister of petitioner.

The petition to probate the lost will of W. C. Martin, deceased, was signed Dan S. Martin, Jr., by his attorney.

Thereafter, there was filed in connection with said peti-

tion an affidavit from Dan S. Martin, Sr., the father of petitioner, to the effect that Dan S. Martin, Jr., the petitioner, was in the Armed Services of his country; that the facts averred in the petition were true according to the best of affiant's knowledge, information and belief and that Dan S. Martin, Sr. was the agent of Dan S. Martin, Jr., the petitioner.

The respondents Dan S. Martin and J. D. Martin accepted service of notice of filing petition to probate the lost will and waived further service.

Thereupon the Probate Court of Jefferson County, Alabama made and entered an order setting the said petition to probate the lost will for hearing on the 16th day of February 1945, and to hear testimony in proof of the lost will; and ordering that notice be given to John D. Martin and Dan S. Martin, Sr. and Esther Wagner as executrix of the estate of Zoe R. Martin, deceased.

On February 16, 1945, the matter was further continued by the Court until the 23rd day of February 1945; and thereupon the defendant, Esther R. Wagner as executrix of the estate of Zoe R. Martin, deceased, and Esther R. Wagner individually filed demurrers to the petition. The petitioner in the Probate Court, Dan S. Martin, Jr., then filed in the Probate Court in said cause the following paper:

STATE OF ALABAMA,
Jefferson County:

IN THE PROBATE COURT OF SAID COUNTY

No. —

In the Matter of the Estate of W. C. MARTIN, Deceased, Petition to Probate Lost Will. Dan S. Martin, Jr., Petitioner

Now comes petitioner, Dan S. Martin, Jr., in said cause, by his attorney, Erle Pettus, and hereby repre-

sents and shows unto this Honorable Court that he is in the Armed Services of his country; that he has a short time back returned from overseas duty; that he is now temporarily stationed in Washington, D. C., but that, due to his service in the Army, his ability to prosecute his said suit is and would be materially affected.

WHEREFORE, the premises considered, petitioner moves this Honorable Court that a further hearing of this cause be continued and held in abeyance until three months after the service of petitioner in the Armed Services is terminated; and petitioner hereby invokes the protection of the Soldiers and Sailors Civil Relief Act of the United States.

This the 23 day of February, 1945.

(S.) ERLE PETTUS,
As Attorney for Petitioner,
DAN S. MARTIN, JR.

An affidavit by Dan S. Martin, Jr., the petitioner, sworn to by him before a Notary Public, was filed in said cause to the effect that he was in the Armed Services of his country and unable to prosecute the cause; petitioner moved the court to continue the hearing of the cause and that same be held in abeyance until three months after service of the affiant, petitioner in said cause, in the Armed Service is terminated; and petitioner invoked the protection of the Soldiers and Sailors Civil Relief Act of the United States.

The Court, on February 23, 1945, made and entered an order sustaining the demurrers of defendant, Esther R. Wagner, individually and as executrix, to the petition to probate the said lost will and made an order allowing the petitioner 20 days within which to amend his petition.

An affidavit by Dan S. Martin, Sr., was duly filed averring that Dan S. Martin, Jr. petitioner, had entered the Armed

Service of his country in 1941 and had returned a few months prior to making this affidavit from overseas service and that he was temporarily stationed in Washington, D. C. and was on duty. This petitioner stated that it was his information and belief that petitioner's ability to prosecute the said suit was materially affected by the service of petitioner.

Petitioner thereupon amended his petition by adding an additional paragraph nine to said petition in words and figures as follows:

> 9. On information and belief affiant states that the said will was prepared by Val. J. Nesbit, decedent's attorney, and a copy of same was retained by said attorney among his papers; that the original was at one time with the personal papers of the decedent at his office at the Vulcan Rivet and Bolt Company; that the same was at one time removed to the box or vault of decedent at the bank; and that said will was in existence at the time of the death of the decedent. That the decedent before his death stated to your petitioner that the said will was in existence, duly executed and discussed the contents of the same with your petitioner.

And said amendment was duly verified by the petitioner and Dan S. Martin, Jr. himself before a Notary Public.

Thereupon the Probate Court noted the filing of the amended petition together with the motion for stay of the proceedings until the service of petitioner in the Army was terminated and the Court made an order passing the hearing on the amended petition until the 30th day of March 1945.

Thereupon the petitioner, Dan S. Martin, Jr., filed objection to a further proceeding in said cause as follows:

THE STATE OF ALABAMA,
Jefferson County:

IN THE PROBATE COURT OF SAID COUNTY

In Re: W. C. MARTIN, Dec'd. Petition of Dan S. Martin, Jr., to Probate Lost Will of Said Decedent

Now comes said Petitioner, Dan S. Martin, Jr., by his attorney, Erle Pettus, and hereby, after having filed his affidavit and motion for a continuance under "The Soldiers' and Sailors' Civil Relief Act of 1940, as amended in 1942 and 1944", of the U. S., hereby represents to this Honorable Court that he is incapable of properly prosecuting his said cause or suit, on account of his military service at this time; and said petitioner hereby objects to any further action in said cause; and represents to said Court that any further action or proceeding in said cause or proceedings will be highly prejudicial to petitioner's rights in the premises.

(S.) ERLE PETTUS,
As Atty. for Petitioner.

The objection of the petitioner having been overruled by the Court petitioner through his attorney filed the following statement averring that due to the absence of petitioner in the Armed Services of his country he was unable to further proceed with the prosecution of the cause, which said paper was as follows, namely:

THE STATE OF ALABAMA,
Jefferson County:

In Re: Estate of W. C. Martin, Dec'd. Petition of Dan S. Martin, Jr., to Probate Lost Will of Said Decedent

Now comes said petitioner by his atty. and after the Court, over his objection, has permitted the refiling of respondent's demurrers to the Petitioner's

amended Petition, as amended on March 14, 1945, and after the Court over Petitioner's objection has ruled upon same sustaining said demurrers; the Court thereupon called upon Petitioner's attorney in open court to state whether or not he desired to plead further, or whether or not Petitioner desired further time within which to amend or plead further, and Petitioner's said attorney answered in reply that because of the absence of petitioner in the armed service of his country, Petitioner was and is unable to amend or proceed further in said cause at this time.

(S.) ERLE PETTUS,
As Attorney for Petitioner.

Thereupon on March 30, 1945, the Probate Court made and entered the following order and final judgment in said Probate Court:

Case No. 12837

PROBATE COURT

March 30, 1945.

W. C. MARTIN, Deceased, Estate of, In Re: Petition as Amended, to Probate His Lost Last Will and Testament

This matter coming on to be heard upon the petition as amended, of Dan S. Martin, Jr., for the probate of the Lost Last Will and Testament of W. C. Martin, deceased, and also upon the motion of Dan S. Martin Jr., to continue the hearing of said cause until three months after the service of said movant in the army is terminated; which said petition and motion were heretofore filed in this Court and set for hearing on this date:

Upon consideration of the foregoing motion, the Court is of the opinion that same should be denied upon the grounds that movant has no interest in the matter alleged, by reason of the fact that nothing in the

record shows the existence or loss of any valid will. It is therefore, ORDERED, ADJUDGED and DECREED by the Court that said motion be and the same is hereby denied.

WHEREUPON, Erle Pettus, as Attorney for Dan S. Martin, Jr., filed objection to any further action or proceedings in said cause;

WHEREUPON, Esther R. Wagner, as Executrix of the Estate of Zoe R. Martin, Deceased, and Esther R. Wagner, Individually, by her attorneys, Lange, Simpson, Brantley & Robinson, and Smyer & Smyer, refiled demurrers to Petitioner's petition, as amended on March 14, 1945.

Upon consideration, it is the opinion that demurrers are well taken. It is therefore, ORDERED, ADJUDGED and DECREED by the Court that said demurrers be sustained the same are hereby sustained.

In open Court the petitioner, by his attorney, Erle Pettus, having declined to plead or proceed further in the case, it is therefore,

ORDERED, ADJUDGED and DECREED by the Court that said petition as amended be and the same is hereby disallowed and on motion of Esther R. Wagner as Executrix in open court, said petition is dismissed.

The petitioner in the Probate Court thereupon perfected his appeal to the Supreme Court of the State of Alabama from this final judgment in the Probate Court dismissing his petition, after having disallowed and overruled the soldier's application and request for a stay of the proceeding.

On November 27, 1945, the cause was submitted in the Supreme Court of Alabama; and on March 7, 1946, the Supreme Court of Alabama handed down its opinion and judgment affirming the judgment of the Probate Court of Jefferson County, Alabama, denying the soldier's right to a stay of the proceeding, and dismissing the soldier's

petition to probate the lost will of his deceased uncle.

Thereupon the appellant in the Supreme Court of Alabama, petitioner in the Probate Court, made his motion and application for rehearing of the judgment of the Supreme Court of Alabama rendered on the 7th day of March 1946, and filed his brief and argument in support of said motion for rehearing.

The record shows that appellant's petition for rehearing filed on the 21st day of March 1946, after being duly examined and considered by the Supreme Court of Alabama, was overruled and disallowed on the 11th day of April 1946.

The opinion of the Supreme Court of Alabama is set forth in full in the certified transcript herewith filed.

Application for rehearing in said cause in the Supreme Court of Alabama was denied and disallowed without opinion. This was a final judgment.

This Court Has Jurisdiction

A soldier in the Armed Service of his country has been denied his day in court guaranteed to him by the Federal Statute known as The Soldiers' and Sailors' Civil Relief Act. He has been denied and refused the right to prosecute his suit.

The Federal Statute relied upon is set out in Title 50 U. S. C. A. as Section 521 as follows:

> "521. Stay of Proceedings Where Military Service Affects Conduct Thereof
>
> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the Court in which it is pending, on its own motion, and shall, on application to it

by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. Oct. 17, 1940 c. 888 #201, 54 Stat. 1181. U. S. C. A. Title 50, App. 521, page 139 War Appendix."

Right Claimed under Statute of United States Denied

The Supreme Court of the State of Alabama effectually denied to your petitioner a right claimed under the Statute of the United States.

The State Court decided a Federal question of substance not theretofore fully determined by the Supreme Court of the United States.

The State Court decided the Federal question in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

The question of petitioner's right claimed under the Federal Statute was raised and fully presented; and his insistence that the proceedings in the Probate Court be continued or stayed on account of petitioner's services in the Armed Forces of his country was arbitrarily overruled and disallowed and his suit dismissed without petitioner ever having had an opportunity to present his case.

In its opinion the Supreme Court of Alabama stated the questions raised on appeal as:

(1) Whether petition to probate the alleged lost will of W. C. Martin, deceased, was subject to demurrer.

(2) Whether the Probate Court erred in refusing to stay the proceedings on account of the military service of the petitioner. As to the latter, the question was whether or not on application to the Court by the soldier or some

person in his behalf, the proceedings should be stayed as provided in the Act, unless, in the opinion of the Court, the ability of plaintiff to prosecute the action, or defendant to conduct his defense, *is not materially affected by reason of his military service.*

The record shows that in the Probate Court after the demurrers were sustained to the amended petition of the petitioner the Court called upon the petitioner's attorney in open Court to state whether or not he desired to plead further or whether or not he desired further time in which to amend or plead further; and the petitioner's attorney in reply stated that because of the absence of the petitioner in the Armed Services of his country petitioner was and is unable to amend or proceed further in said cause at this time.

Upon this, the Court made and entered the above judgment and decree declaring among other things that "in open Court the petitioner by his attorney, Erle Pettus, having declined to plead or proceed further in the case it is therefore

"ORDERED, ADJUDGED and DECREED by the Court that said petition as amended by and the same is hereby disallowed and on motion of Esther R. Wagner as Executrix in open court said petition is dismissed."

Upon this the Supreme Court in its opinion says "the case was never set for hearing on its merits. The Court did not pass upon the question as to whether or not the trial upon the merits would be stayed. The Court merely required, with the attorney in court, for the case to proceed to the point of having before the court a proper petition. But further pleading was declined."

The Question Presented

The question presented in this Honorable Court is whether or not a soldier while actually in the Armed Services of his country without dispute shall be entitled to the protection of the Federal Statute known as The Soldiers' and Sailors' Civil Relief Act so as to be permitted to have his day in court.

The term "Court" as used in the Soldiers' and Sailors' Civil Relief Act includes any court of competent jurisdiction of the United States, or any state, whether or not a court of record. Where no proceeding has already been commenced in court and the act requires an application to be made to a court, it may be made to any court.

Am. Vet. page 696, Section 880.

Reasons Relied on for Allowance of Writ

The Federal Question presented involves the construction, the application, and the effect of that section of the Soldiers' and Sailors' Civil Relief Act in reference to stay of proceedings where Military Service affects conduct thereof. By its terms the act is applicable to any action or proceeding in any court in which a person in military service is involved, either as plaintiff or as defendant, during the period of such service.

Title 50, U. S. C. A. App. Section 521, October 17, 1940, C. 888, Section 201, 54 Statute 1181.

This proceeding instituted in the Probate Court of Jefferson County, Alabama, a court of competent jurisdiction, by the petitioner Dan S. Martin, Jr., a soldier then in the Armed Service of his country, sought to probate a lost last will of his deceased uncle, W. C. Martin.

Under the Alabama law prior to the decision by the Supreme Court of Alabama in the instant case, although

the execution of a will is required to be attested by two witnesses, a lost will may be established by the testimony of a single witness.

When the contents of a lost will are not completely proved the probate may be granted as to the provisions which are proved. Proof of substance of a lost will is sufficient and the exact words need not be shown.

Skeggs v. *Horton,* 82 Ala. 352;
Allen v. *Scruggs et al.,* 190 Ala. 654;
Jordan v. *Ringstaff,* 212 Ala. 413.

No special form of pleading is prescribed or required under the Alabama law for the purpose of probating a will. An application for the probate of a will may be made verbally or in writing.

Small v. *McCalley,* 51 Ala. 527.

All that was required for the probate of a lost will under the Alabama law was to show its existence or that it was in existence, an instrument in writing properly executed; its loss or destruction in the event it was in existence at the time of testator's death, and the contents in substance and effect.

Potts v. *Coleman,* 86 Ala. 94;
Jacques v. *Horton,* 76 Ala. 238;
Price v. *Price,* 199 Ala. 433;
Washam v. *Beaty,* 210 Ala. 635.

The Supreme Court of Alabama in its opinion says the questions for decision in that appeal are:

(1) Whether the petition to probate the lost will of W. C. Martin, deceased, was subject to demurrer.

(2) Whether the court erred in refusing to stay the proceedings on account of the military service of petitioner.

The Supreme Court then held that the petition filed in the Court below was demurrable for having failed to aver the name of the other subscribing witness or give a valid excuse for not averring his name.

This constituted an innovation in the Alabama law as no statute up to the date of this Alabama Supreme Court decision required petitioner in propounding a lost or stolen will for probate to make the averment of the names of two subscribing witnesses.

In fact, Title 61, Section 39 of the Code of Alabama provides that where no contest is filed (to the probate of a will) the testimony of one attesting witness is sufficient. If the Supreme Court of Alabama could correctly hold upon the record before it in this case that the demurrer to the petition to probate the lost will of the decedent was properly sustained; and that the petitioner must amend his petition; he was required in effect to amend his pleadings in this instance by averring the name of the other subscribing witness to the will. To make such amendment, the presence of the petitioner would have been necessary. He should have been allowed the right, not only to be in court, but to have an opportunity to prepare his case for trial; to make an exhaustive search for the witness if necessary; or to account for his inability to produce the name of the witness; as well as to confer with his counsel, and make preparation for trial. The trial court sustained the demurrer and then over objection arbitrarily entered final judgment or decree disallowing the amended petition of petitioner, and on motion of Esther R. Wagner as Executrix dismissed the petition. This was an abuse of discretion by the trial court; an arbitrary act of the court in dismissing the petition without the absent soldier ever having had an opportunity to prepare or present his case; or to secure the necessary facts and evidence to amend his

petition as required by the trial court; or to present to the court the evidence to sustain his petition. The petitioner was denied and refused his day in court.

On January 18, 1945, in case *Ex Parte Jones,* 20 So. (2d), page 859, Justice Stakely of the Supreme Court of Alabama, who also wrote the opinion for the Court in the instant case, defined "abuse of discretion" by quoting approvingly from *Peyton* v. *State,* 244 Ala. 10, 13 So. (2d) 422; an opinion from the Chief Justice of the Alabama Supreme Court as follows:

> "And while it is not necessary, to constitute abuse, that the court shall act wickedly or with intentional unfairness, it is essential to show that it has committed a clear or palpable error, without the correction of which manifest injustice will be done. Since the court trying the cause is, from personal observation, familiar with all the attendant circumstances, and has the best opportunity of forming a correct opinion upon the case presented, the presumption will be in favor of its action, and in no case will the exercise of this discretion be reviewed where it manifestly appears that justice has been done without sacrificing the rights of defendant" (20 So. (2d) page 862).

That definition was written in regard to an ordinary continuance of a cause; but the facts here presented involved the rights of a soldier under the Federal Statute.

Under this Statute it has been held that the Court in denying a stay of proceeding should make a finding of the facts upon which it bases its opinion; and should conclude that the ability to defend is not materially affected by military service.

Esposito v. *Schille,* 40 A (2) 475, 135 Conn. 449.

This Federal Statute makes mandatory the staying of proceedings when application is made for one in military service *unless* in the opinion of the court the ability of de-

fendant to conduct his defense is not materially affected by reason of such service.

In re: Adoption of a minor, 136 Fed. (2d) 790, 78 U. S. App. D. C. 48.

The Act must be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation; and discretion vested in trial courts to that end is not to be withheld on mere speculations as to whether prejudice may result from absence resulting from service.

Boone v. *Lightner,* 63 Sup. Ct. 1223, 319 U. S. 561, 87 L. Ed. 1587.

One of the various purposes of the Act was to give the assurance that in the field of individual justice no advantage in judicial proceedings filed against a soldier or sailor would result from his absorption in his country's defense.

Am. Vet., page 690, Section 867;
Bowsman v. *Peterson,* 45 Fed. Supp. 741.

The application need not set forth facts which a party will swear and when he will be able to appear; nor need it be verified or sworn to.

Am. Vet., Sec. 900, page 712.

While the question of burden of proof upon such application as that made in the instant case has not been fully decided, it has been held that absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial.

Boone v. *Lightner,* 319 U. S. 561.

It has been said that the duty is imposed on the trial judge to inquire and find whether or not the ability to de-

fend the party seeking the stay is materially affected by reason of his military service.

Adoption of Minor, 78 U. S. App. D. C. 48, 136 Fed. (2) 790.

Doubtful cases should be resolved in favor of the service man.

Johnson v. *Johnson,* 59 Cal. App. (2) 375, 139 P. (2) 33.

In holding against the soldier in the instant case the Supreme Court of Alabama relies heavily upon the case of *Oliver* v. *Oliver,* 12 So. (2d) 852, 244 Ala. 234.

There the question was whether or not the complainant in a divorce suit who made the proper affidavit that the defendant was not a member of the Armed Services of the United States and that he was physically disabled for such service was sufficient compliance with the law. There was no evidence whatsoever in that case that the defendant was in the Armed Services and the question was not one of staying the proceedings.

The Supreme Court of Alabama also cites and apparently relies upon some excerpts of the opinion in the case of *Boone* v. *Lightner,* 63 Sup. Ct. 1223, 319 U. S. 561, 87 L. Ed. 1587. The facts in the *Boone* case bear no resemblance to the facts in the case at bar. There without dispute the defendant himself a lawyer had conducted a good portion of the trial; and was also represented by counsel; and a good portion of the evidence had been taken with the concurrence of the defendant. The defendant was there charged with misappropriation of trust funds.

The Court found in the *Boone* case that the defendant had ample time and opportunity to properly prepare his defense; that his military service had not prevented him from doing so, and held that the motion was not made in

good faith but that the defendant sought to invoke the protection of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrongdoing.

Here there is no charge against the petitioner of wrongdoing; he was a soldier without doubt and there is no question about his being in the Armed Services; and there was no evidence whatsoever to show that his substantial cause of action could be properly conducted and prosecuted in his absence without prejudice to his rights.

On a question of even an ordinary continuance it has been said:

> "Party to a cause in a measure directs or assists in the management of the case by suggestion and advice to his attorney during the progress of the cause, the striking of the jury, the order in which witnesses are examined, and questions to be propounded. By his familiarity with the facts of the case, the facts within his knowledge personally, he is of great assistance to his counsel, and a trial judge should exercise great caution in the exercise of his discretion in matters of continuance on account of the absence of a party to the suit.
>
> *Barnes* v. *Atlantic Coast Line R. R. Co.*, 96 S. E. 530, 110 S. C. 259. 17 C. J. S. p. 210."

The *Boone-Lightner* case, *supra,* presents an extreme situation; we have not found any decision of the Supreme Court of the United States fully construing and clarifying the Federal Statute in question as applicable to a case such as here presented. Numerous state and lower court decisions are not fully in accord as to the exact meaning and effect of the Soldiers' and Sailors' Civil Relief Act.

This case presents a clear-cut question as to whether or not the party to the litigation being at the time in the Armed Services of his Country shall upon application to the court in which such matter is pending be granted a stay; or whether the discretion of the trial court may be arbitrarily

exercised against the rights of the soldier. The act itself provides that the court may of its own motion stay the action; but whenever the party or some one in his behalf applies for the stay it must be granted, unless the court is of the opinion that the ability of the plaintiff to prosecute, or defendant to conduct his defense is not materially affected by his absence in military service. This proviso makes it discretionary with the court to grant or deny the stay, although this discretion may be less extensive where an application is made therefor than where it is granted upon the Court's own motion. It has been said that the Court's opinion must be based on some character of showing made to it and that in doubtful cases the stay should be granted.

Am Vet., page 708, Sec. 896, citing
Reynolds v. *Haulcroft*, 205 Ark. 760;
Burke v. *Hyde Corp.*, Tex. Civ. App. 173 S. W. (2d) 364;
Johnson v. *Johnson*, 59 Cal. App. (2d) 375, 139 Pac. (2d) 33.

The certiorari should be granted in this case and the cause reviewed to the end that in the field of individual justice no advantage in judicial proceeding by or against a soldier or sailor might here result; and also to the end that the Supreme Court of the United States may construe and declare the rights of the person in the Armed Services as granted in the Soldiers' and Sailors' Civil Relief Act.

Respectfully submitted,

ERLE PETTUS,
Counsel for Petitioner.

JACKSON, RIVES & PETTUS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 239

DAN S. MARTIN, JR.,
Petitioner,

vs.

ESTHER R. WAGNER, AS EXECUTRIX OF THE ESTATE OF ZOE R. MARTIN, DECEASED, JOHN D. MARTIN AND DAN S. MARTIN, SR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT, MRS. ESTHER R. WAGNER, AS EXECUTRIX OF THE ESTATE OF ZOE R. MARTIN, DECEASED, AND INDIVIDUALLY.

JAMES A. SIMPSON,
Attorney for Respondent.

SMYER & SMYER
LANGE, SIMPSON, ROBINSON & SOMERVILLE
Of Counsel.

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BRIEF OF RESPONDENT, MRS. ESTHER R. WAGNER, AS EXECUTRIX OF THE ESTATE OF ZOE R. MARTIN, DECEASED, AND INDIVIDUALLY.

OPINIONS BELOW

The Probate Court of Jefferson County, Alabama, entered a final order and decree (R. 12) without an opinion. The order is not reported.

The opinion of the Supreme Court of Alabama (R. 18-23) has not been officially reported, but such opinion may be found in *25 So (2d) 409.*

STATEMENT OF THE CASE

The order of the Probate Court of Jefferson County, Alabama, of which the Petitioner complains, is dated March 30, 1945, and is set out on page 12 of the Record. The first ruling in the order is one denying the Petitioner's motion to continue the hearing of the cause until three months after the termination of the services of the Petitioner in the army.

The second part of the order is one sustaining the demurrers of the Respondent, Mrs. Esther R. Wagner, to the Petition to Probate the alleged lost will.

The final portion of the order contains a dismissal of the Petition to Probate upon a statement by the Probate Court that the Attorney for the Petitioner in open Court had declined to plead or proceed further in the case.

The original Petition to Probate the alleged lost will was filed January 15, 1945, as shown by the order setting the matter for hearing (R. 5). By order of February 16, 1945, the hearing was continued until February 23, 1945. (R. 6).

The respondent, Mrs. Esther Wagner as Executrix of the estate of Zoe R. Martin, deceased, and in her individual capacity (evidently as a distributee of the estate of Mrs. Zoe R. Martin), filed a demurrer to the Petition, challenging the sufficiency of the allegations thereof (R. 6). On February 23, 1945, the day set for the hearing, a written motion was filed by the Attorney for the Petitioner in the Probate Court, (R. 7), that the hearing of the cause be continued and held in abeyance until three months after the termination of the services

of the Petitioner in the armed forces, based upon the general statement that Petitioner had a short time back returned from overseas duty, that he was then temporarily stationed in Washington, D. C., but that, due to his service in the army, his ability to prosecute his said suit was and would be materially affected.

By order of February 23, 1945, (R. 8), the Probate Court, after sustaining the demurrers to the Petition, granted the Petitioner twenty days within which to amend, at the same time denying the Petitioner's motion to have the entire cause held in abeyance until three months after the termination of his services in the army.

On March 14, 1945, an amendment to the Petition, signed and sworn to by the Petitioner himself, was filed in the Probate Court (R. 10). This amendment alleged merely that the will, alleged to be lost, was at one time retained by the Attorney for the Decedent, William C. Martin; that it was at one time with the personal papers of the said decedent and that it was then removed to a box or vault of the decedent at the bank; that the said decedent before his death stated to the Petitioner that the will was in existence, "duly executed", and that decedent discussed the contents with the Petitioner. This amendment, however, failed, as did the original Petition, to set forth the names of both of the alleged subscribing witnesses, to otherwise identify them, or to show an excuse for failure to do so.

While the oath of the Petitioner to the amendment is omitted in the printed Record, the original Record shows that it was taken *before a Notary Public in Jefferson County, Alabama.* In other words, the Petitioner on March 14, 1945, at the time the amendment was filed, was not in Washington, D. C., but was evidently physi-

cally present in Jefferson County, Alabama, doubtless on leave.

On the same day, March 14, 1945, there was filed in the Probate Court an affidavit of the Petitioner himself, also before a Notary Public of Jefferson County, Alabama, as shown by the original Record, which moves the Court "to continue the hearing of this cause and that the same be held in abeyance until three months after the services of the affiant, the Petitioner in the said cause, in the armed services is terminated". This is supported only by a general statement that Petitioner is in the armed services and "unable to properly prosecute the said cause" (R. 8).

On the same day, March 14, 1945, the Probate Court entered an order (R. 10) setting both the motion to continue the hearing, and the amended petition, for a hearing on the 30th day of March, 1945.

Either on March 14, 1945 or at some time thereafter and on or before March 30, the Attorney for the Petitioner filed "Petitioner's Objection to Further Action" (R. 11) in which it was stated in behalf of Petitioner that Petitioner objected to any further action in the cause and that any further action would be highly prejudicial to his rights.

On March 30, 1945, the day on which the final order dismissing the Petition was made after Petitioner's Attorney declined to proceed or plead further, the Attorney for the Petitioner filed what he designated as "Petitioner's Reply to Court's Invitation to Proceed Further", (R. 11). Believing it to be significant, we herewith set it forth in full:

"Now comes said petitioner by his atty. and after

the Court over his objection has permitted the refiling of respondent's demurrers to the Petitioner's amended Petition, as amended on March 14, 1945, and after the Court over Petitioner's objection has ruled upon same sustaining said demurrer's; the Court thereupon called upon Petitioner's attorney in open Court to state *whether or not he desired to plead further, or whether or not Petitioner desired further time within which to amend or plead further,* and Petitioner's said attorney answered in reply that because of the absence of Petitioner in the armed services of his country Petitioner was and is unable to amend or proceed further in said cause at this time." (Emphasis ours)

The opinion of the Supreme Court of Alabama (rendered upon an appeal by Petitioner from the Probate Court's order of March 30, 1945, and affirming the order of the Probate Court), in construing the nature of the order of the Probate Court made upon Petitioner's Attorney's declining to plead further, states in part as follows:

"The Petitioner was represented by able counsel and the cause never progressed beyond the state of pleading prior to trial. The case was never set for hearing on its merits. The Court did not pass upon the question as to whether or not trial upon the merits would be stayed. The Court merely required, with attorney in court a proper petition. But further pleading was declined." (R. 23)

The foregoing statement of the case is made with a view toward outlining briefly, from the standpoint of Respondent, Mrs. Wagner, the nature of the motions of Petitioner to continue the entire proceeding under the Soldiers' and Sailors' Civil Relief Act, and toward em-

phasizing that the order of the Probate Court denying a general stay of the proceedings did not compel Petitioner to proceed at the time to a hearing on the merits, but required him merely to file a proper and legal Petition.

In this statement no mention is made of any portion of the Record before the Supreme Court of Alabama and the Probate Court of Jefferson County, Alabama, in a proceeding brought by Dan S. Martin, Sr., father of the Petitioner, to Probate an alleged lost will of the same decedent, William C. Martin. We deem it proper, however, to make brief reference to the facts set up in the Respondent's motion to correct a diminution of the record in this cause, in a separate section at the end of this brief, entitled "Argument in Support of Respondent's Motion for Certiorari to Correct a Diminution of the Record."

ARGUMENT

Respondent is confident that when the decision of the Trial Court in this case, the Probate Court of Jefferson County, Alabama, and of the Supreme Court of Alabama are viewed in the light of the principles established in *Boone v. Lightner, et al, 319 U. S. 561; 63 S. Ct. 1223,* the final judgment of the Supreme Court of Alabama will not be disturbed by this Court.

The first principle is that a mere showing that a plaintiff or defendant in the military service (defendant in that case) is in Washington does not render a stay or continuance mandatory, the legislative history of the antecedent of the Soldiers' and Sailors' Civil Relief Act of 1940 showing that judicial discretion conferred on the Trial Court by Section 201 of the Act instead of

rigid and undiscriminating suspension of civil proceedings is the very heart and policy of the act.

As we read the Petitioner's brief, he does not dispute this principle, and accordingly we proceed to what we conceive to be the second principle involved, that dealing with the burden of proof under Section 201. With reference to that, this Court says:

> "The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its good policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come. One case may turn on an issue of fact as to which the party is an important witness, where it only appears that he is in service at a remote place or at a place unknown. The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and as to which he is fully covered by insurance. Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war. To say that the mere fact of a party's military service has the same significance on burden of persuasion in the two contexts would be put into the Act through a burden of proof theory the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with

facts needful to a fair judgment." (P. 1228, 1229 63 S. Ct.)

We, therefore, take it as settled that a sound discretion vests in the Trial Court, whether state or federal, not only in determining the ultimate question whether the cause should be stayed because of the military service of one of the parties, but also in determining the procedure by which the ultimate question shall be settled, that is, whether the burden should be placed upon the party in the military service affirmatively to show that absence because of such service materially impaired his ability to prosecute or defend, or whether the burden should be placed upon his opponent to establish the contrary.

With that principle in view, a vital inquiry in this case is: did the Probate Court of Jefferson County have the right in the exercise of its discretion, to look to the Petitioner to come forward with facts excusing the Petitioner from making any effort while he was in the army to plead further in the cause, in order that the Court might ascertain whether he had a cause of action, and, if so, did the Petitioner make a sufficient showing in that regard?

We have stated the question in the above phraseology because we believe that the proceedings in this case clearly demonstrate that the Trial Court neither required that the Petitioner proceed to a hearing on the merits on March 30, 1945 (the day on which the order of which Petitioner complains was made), nor even that he submit a final amendment to his Petition on that day. As proof of this, nothing further is needed than the written statement filed by Petitioner's own Attorney entitled "Petitioner's Reply to Court's Invitation to Proceed Further" (R. 11),

which, after outlining that the Court had over Petitioner's objection permitted the refiling of Respondent's demurrers to the Petitioner's amended Petition, and had over a similar objection sustained the demurrers thereto, stated in part as follows:

> "the Court thereupon called upon Petitioner's Attorney in open Court to state whether or not he desired to plead further, *or whether or not Petitioner desired further time within which to amend or plead further,* and Petitioner's said attorney answered in reply that because of the absence of Petitioner in the armed services of his country, Petitioner was and is unable to amend or proceed further in said cause at this time." (Emphasis ours)

In characterizing the hearing of March 30, 1945, and the final order of the Probate Court made that day, as relating not to a trial on the merits but only to the sufficiency of the Petition as a matter of pleading, the Supreme Court of Alabama in its opinion used the following language:

> "The Petitioner was represented by able counsel and cause never progressed beyond the state of pleading prior to trial. The case was never set for hearing on its merits. The Court did not pass upon the question as to whether or not trial upon the merits would be stayed. The Court merely required, with the attorney in court a proper petition. But further pleading was declined."

Since there is nothing in the record to indicate the contrary, this construction of the procedure of the Probate Court and the nature of its order should be accepted as conclusive.

While the Alabama Supreme Court did not specifi-

cally refer to the fact that the Probate Court called further upon Petitioner's Attorney to state whether or not he desired further time within which to amend or plead further, this is evidenced by the Attorney's own statement in the record itself. It is thereby affirmatively indicated that the Probate Court did not foreclose the seeking by Petitioner's Attorney of further time within which to amend and if need be to communicate with the Petitioner in Washington or with the Petitioner's father and agent, who was presumably in Birmingham, if he so desired, for that purpose.

Therefore, the most that the Petitioner can complain of in this case is that the Trial Court required of him a reasonable effort to state by preliminary pleading sufficient facts to constitute a cause of action, instead of acceding to his Attorney's arbitrary demand to do nothing whatsoever until three months after the termination of Petitioner's military service. When on March 30, 1945, the court inquired of the Petitioner's Attorney whether he wished further time in which to amend, Mr. Pettus, his Attorney, elected not to communicate further with his client to determine whether he had or could obtain further information to supply the defect in the Petition, but by declining to make an effort to plead further or to proceed in any manner, chose to stand on what he evidently conceived to be his client's absolute right not to be required to take any step whatsoever in the case until such time as his military service should end. His client, we submit, had no such right.

The vital defect in the Petition, according to the holding of the State Supreme Court, lay in the fact that the allegations thereof failed to disclose the names of both of the alleged subscribing witnesses to the alleged

lost will or a valid reason for the failure to give such information. While the name of one of the subscribing witnesses was alleged to be Val J. Nesbitt, Attorney for the Decedent, W. C. Martin, (Petition, R. 2), no mention was made of the name or identity of the other. While it is true, as pointed out in the Supreme Court opinion, that on a hearing on the merits the testimony of a single witness might be sufficient proof of the substance of a lost will and of the facts essential to a valid execution, such as the attestation by at least two witnesses subscribing their names to the instrument in the presence of the testator, all these essential facts must nevertheless be alleged as well as proved.

Thus, although it is conceivable that in a rare case the names of one or more of the subscribing witnesses would not be known to any of the persons attempting to testify concerning the execution of the lost will, as a matter of pleading the existence of circumstances making it impossible to name both of the attesting witnesses must be set forth, as the State Supreme Court held.

The Petitioner's Attorney intimates in the Petition for Certiorari that, according to the decisions of the Supreme Court of Alabama rendered prior to the instant case, the Petition was legally sufficient. We disagree, but do not think it material to any issue involved here. Suffice it to say that the State Supreme Court's decision in this case on that point, involving as it does purely a question of local law, is now controlling. It is elementary that with the decision of the state court on such a point, this Court will decline to interfere.

Let us then outline the circumstances prevailing at the time of the entry of the Probate's order of dismissal of March 30, 1945, as shown by the record and the opinion

of the State Supreme Court, without regard to the additional circumstances detailed in the motion for certiorari to correct a diminution of the record filed by the respondent:

William C. Martin, the alleged testator, died July 18, 1940, leaving a widow, Zoe R. Martin, and two brothers (one of whom was Dan S. Martin, Sr., father of the Petitioner), as his next of kin and heirs at law under the laws of descent and distribution of the State of Alabama. Petitioner would have no interest in the estate in the absence of a will making provision for him. [1]

Prior to the death of Zoe R. Martin, Dan S. Martin, Petitioner's father, filed a Petition to Probate the Alleged Lost Will of William C. Martin, deceased, and took an appeal from the final judgment or decree of the Probate Court of Jefferson County, the same court as in this proceeding, denying, disallowing and dismissing the Petition.

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[1]. Under Alabama law the real estate of a person dying intestate descends, if there are no children or their descendants, and no surviving parents, to the brothers and sisters of the intestate or their descendants, in equal parts, in preference to the widow; Title 16, Section 1, Ala. Code of 1940. The widow, however, under Title 34, Section 40 et seq., has a dower interest in the real estate of the intestate. The personal property of the intestate descends under such conditions to the widow in preference to brothers and sisters; Section 10, Title 16. Nieces and nephews who are children of surviving brothers and sisters of the decedent take neither real nor personal property from the estate of decedent under any conditions except through a will. The widow during her lifetime, and her estate after her death, may in all cases dissent from the will and take that portion of the estate to

This appeal was dismissed by agreement April 12, 1943, almost two years before the filing of the present proceeding. The Attorney for the Petitioner in this case is the same attorney who represented Dan S. Martin, the father, in his proceeding. The foregoing facts set out in this paragraph are taken almost verbatim from the penultimate paragraph of the State Supreme Court opinion in this case. (R. 23). The Supreme Court citing *Catts v. Phillips, 217 Ala. 488; 117 So 34,* impliedly adopted the record of the Petition of Dan S. Martin, Sr., we say, as a part of the record in this cause. *Catts vs. Phillips, supra,* deals with the principle of the taking of judicial notice of the record of another case in the same court in appropriate cases, and in citing it the Supreme Court undoubtedly meant to be understood as taking judicial notice of the Petition of Dan S. Martin, Sr., and as authorizing the Probate Court below, in which both proceedings originated and were tried, to do likewise. We therefore think that the statement made by the Supreme Court relative to the proceeding of Dan S. Martin, Sr. should be considered a part of the record in this case, without regard to the motion to correct a diminution.

After the Probate Court on February 23, 1945 overruled the motion of Petitioner in this case to hold the cause in abeyance until after the termination of his military service and sustained the demurrers to the Petition because of the failure to identify the subscribing witnesses, the Petitioner on March 14, 1945, after being granted

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which she would have been entitled in cases of intestacy, (subject to a limitation that if there are no children the dissenting widow may take the personal estate only to the extent of $50,000 in value, the excess being distributed as provided in the will); Title 61, Section 18 to 21, inclusive, Ala. Code of 1940.

twenty days for that purpose, filed an amendment which he himself verified *before a Notary Public in Jefferson County, Alabama.* (R. 10, Jurat omitted in printing, but shown in the original record on file). This amendment contained no additional allegation whatsoever concerning the names or identities of the subscribing witnesses and thus failed to cure the substantial defect in the original Petition. Except for allegations concerning the temporary location of the alleged lost will, the only averment of the amendment was that the alleged testator before his death stated to Petitioner that the said will was in existence and discussed the contents thereof with the Petitioner.

Thus, the second proceeding to probate an alleged lost will was filed almost five years after the death of W. C. Martin and after the Petitioner, according to his affidavit, acquired information of the existence of such a will.

We thus may assume that the Probate Court, having entertained and dismissed one proceeding involving the attempted establishment of an alleged lost will of the same decedent,[1]. was interested in ascertaining at the earliest practicable time, before deciding to hold the entire proceeding in abeyance for the duration of the military service of Petitioner and thereby to delay indefinitely the administration of the decedent's estate, whether the Petitioner, or Petitioner's father, or their able attorney, had actually acquired over a period of nearly five years, sufficient information upon which to base a claim that there

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[1]. While we maintain that the Alabama Supreme Court's comment pertaining to the filing of the previous Petition of Dan S. Martin, Sr. should be taken into consideration, we think that this fact,

was a validly executed and attested will under which the Petitioner, who otherwise had no interest whatsoever in the estate, was a beneficiary.

While the record now before the Court does not disclose that during the period of almost five years since the death of the decedent an executor or administrator of his estate had already been appointed, [1]. it is reasonable to assume that the estate was being administered, and also to assume that the Judge of Probate had acquired knowledge of the condition and value of the assets thereof. By section 96, Title 61, Alabama Code of 1940, the amount of the bond required to be given by an administrator and to be approved by the Judge of Probate, is fixed as to amount by the estimated value of the real and personal property of the estate. By Section 189, same Title, every administrator must file an inventory of the personal property, upon the filing of which the Probate Court must, by Section 193, effect an appraisal of the value of the personal property. In any event, the Probate Judge is presumed to be acquainted in some degree with the property

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[1]. The record of the proceeding of Dan S. Martin, Sr., the father, as shown by the demurrer to the Petition according to the motion to correct the diminution of the record in this cause, discloses that Mrs. Zoe R. Martin was appointed administratrix of the estate of William C. Martin, deceased.

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known to the Probate Court at the time, is only an additional circumstance, the absence or exclusion of which would not have affected the Probate Court's right to adjudge whether the Petitioner should forthwith be required to file a legal Petition or whether the filing thereof should be postponed until after the termination of his military service.

of the estate. Therefore, for aught appearing in this case, the Judge of Probate considered it his duty, having due regard to the rights of the widow and of her estate after her decease, to require some showing by way of pleading of the Petitioner that there was sufficient merit in his claim to warrant any prolonged suspension of the administration of the estate, necessarily resulting from a holding of the entire proceeding in abeyance. The Probate Judge doubtless entertained a scrupulous and conscientous concern over the possible effect upon the corpus of the estate and the value of the interest of the widow therein of an indefinite delay in administration. If there was any reasonable expectation that a lost will would be established such a delay would, of course, be necessary; but if there were not sufficient facts in possession of Petitioner after so long a time to enable the preparation of a legal Petition, the question of such a reasonable prospect would be remote. Hence, the Court was charged with the sacred responsibility of meting out a fair and impartial judgment by giving due consideration not only to the rights of the Petitioner, but to the rights of others as well.

The fact alleged in the amendment to the Petition that the decedent stated to the Petitioner that there was a will would not, if proven, be sufficient for the establishment or probate of the alleged lost instrument as the will of the deceased, as the State Supreme Court held.[1]

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[1]. (r.p. 21, 22) "We do not consider that the allegation 'that the decedent before his death stated to your petitioner that the said will was in existence duly executed and discussed the contents of the same with petitioner,' makes the pleading good. It does not meet the defect which we have discussed, because the parties are entitled

If the Petitioner had acquired no more information than that, he could, of course, not proceed and the Probate Court thus declared in the order of March 30, 1945, in denying the motion to continue all steps of the proceeding indefinitely, that the Petitioner and movant was not shown to have any interest in the matter alleged "by reason of the fact that nothing in the record shows the existence or loss of any valid will". Undoubtedly the court meant thereby that, the Petitioner having no status as next of kin of the decedent and having failed to allege sufficient facts which if true would establish a will making him a legatee, for aught appearing had no interest whatsoever in the estate involved.

On March 14, 1945, after the Court had put the Petitioner's Attorney on notice that sufficient facts were not alleged and given him ample time within which to obtain any further information in the possession of his client, Petitioner was, as stated, undoubtedly present in person in Jefferson County for a personal conference with

his Attorney.

The fact of his presence in Jefferson County is evidenced not only by the jurat in the unprinted record filed in this Court, but also by the following portion of the opinion of the Supreme Court of Alabama: (R. 23)

> "The record shows that petitioner was at the time stationed within the United States and after the

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to know, if possible, the alleged witnesses, so they may interview the witnesses so as to reach their own conclusion as to the due execution of the will. Besides the allegation at its best merely presents evidentiary matter which from the standpoint of pleading will be regarded as surplusage.—*Buettner Bros. v. Good Hope Missionary Baptist Church et al, 245 Ala. 553, 18 So. (2d) 75.*"

court had sustained the demurrer to his petition upon the ground of his failure to set forth the names of the alleged witnesses or valid excuse for failure to do so, petitioner made an affidavit in Jefferson County confirming the acts of his attorney and invoking the Soldier's and Sailors' Civil Relief Act in connection with an amendment to the petition which he signed. The amendment to the petition also failed to give the name of the other witness to the alleged will or valid excuse for such failure."

Under such circumstances (of which of course the Probate Court was cognizant at the time of its order of March 30) Petitioner could have supplied the name of the other subscribing witness, if he knew it, or could have directed the attention of his Attorney to any knowledge that he had which might relate to the naming or identifying of such witness, having had almost five years within which to obtain such information. If the Petitioner, his father, family and attorney had not over the long period since the death of William C. Martin, marshalled enough information in order to supply the vital defect in the Petition and in his case, the Court's natural inquiries would be: Would such information ever be acquired? How much longer should the Petitioner with the aid of his able Attorney be allowed? Should any person, soldier or civilian, who filed a suit or proceeding without actually being able to allege sufficient facts to constitute a cause of action be given an indefinite period within which to go on a fishing expedition? [1]. Should he not have a case before he files suit?

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[1]. While under Section 34, Title 61, Ala. Code of 1940, there is limitation of five years from the death of the testator within which a will may be filed for Probate, this period of limitation like all others is suspended, we

Should he not, before being allowed to claim that his ability to prosecute a suit is impaired by absence in the military service, first show that he has a suit capable of prosecution?

Whatever information Petitioner had, his ability to make it available to his Attorney for allegation in the Petition was certainly not impaired. Even had it been shown to the Court that he was not given an opportunity to visit his home (which, of course, he did) the Court needed no proof that he was perfectly free to correspond with his Attorney from Washington. In fact, any attempted proof to the contrary would have necessarily been fantastic.

It seems to us that, if and when a proper Petition had been filed by Petitioner's Attorney, then and then only could the question have arisen whether his ability to prosecute his suit was impaired. If, when approaching trial on the merits, his aid was needed in preparing the case, all questions relating thereto, such as whether sufficient furlough or leave of absence before and during the time set for hearing could be obtained from the Commanding Officer of the Petitioner, might be squarely and frankly presented to the Court by the Petitioner's Attorney at that time. This would also be true as to any question pertaining to the time for the taking of his testimony, if he had personal knowledge of any material facts, or of his presence for the trial.

The point at which such questions might have arisen

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believe, as to any prospective proponent during the period of his military service, under the provisions of Section 525, Title 50, Appendix, USC, Soldiers' and Sailors' Civil Relief Act.

was never reached in this case. The only possible question, with reference to any impairment of the ability of the Petitioner to prosecute his suit, was whether his absence in Washington precluded him from furnishing his Attorney information. That question before the Court would answer itself, and the answer would be self-proving, without the necessity of determining upon whom should be the burden of proof.

Even if it be imagined that the Petitioner had possession of information which though insufficient in itself might lead to the discovery of sufficient evidence of facts to establish his case, the natural assumption is that his Attorney, in the absence of Petitioner, would be well able to trace and develop the source of such information.

In the case involved here, there could hardly have been presented an issue of fact as to any impairment of the Petitioner's ability to proceed. Even had the statute placed upon the opposing party the burden of proving in all cases the lack of material impairment as a result of absence in the military service, the decision of the Probate Court in demanding of Petitioner's Attorney a reasonably diligent effort to submit an adequate Petition would have been perfectly justified. On that issue the absence of the Petitioner in Washington would be immaterial and the suggestion in *Boone v. Lightner, supra*, "absence when one's rights or liabilities are being adjudged are usually prima facie prejudicial", would be entirely inapplicable. However, if upon any theory there could have been any question of fact concerning the effect of Petitioner's absence in Washington upon the ability of his Attorney to file a proper pleading, there would have been by no stretch of the imagination an abuse of discretion by the Probate Court in placing such a burden

upon Petitioner. Under the circumstances of this case, the logical inference would be strongly against any impairment of ability to prosecute up to that point.

We, therefore, inquire: Why did not Petitioner's Attorney instead of taking a rigid stand that the Court had no right to proceed even to the point of hearing on demurrer because of his client's invoking the Soldiers' and Sailors' Civil Relief Act, make a full and fair disclosure to the Court of any facts or circumstances which he conceived as impairing the ability to write a legal Petition? Why did he not tell the Court, for example, the reason for knowing the name of one subscribing witness, Val J. Nesbitt, and not knowing the name of the other; that is, why the source of information concerning the one did not naturally lead to the indentification of the other? Instead of his making a general statement by way of conclusion (and having his client do the same by affidavit) that the ability of the Petitioner to prosecute was materially impaired or affected, why did he not explain in full and in detail that during the presence of Petitioner in Jefferson County, Alabama on March 14, 1945, there was not a thorough opportunity to assemble the information necessary to cure the defect in the original Petition if available at all? He contented himself, even upon inquiry by the Court on March 30 whether he desired further time within which to amend or plead further, merely to assume and maintain an obstinate position that "because of the absence of the Petitioner in the armed services of his country, Petitioner was and is unable to amend or proceed further in said cause at the time" (R. 11).

If the terms of the statute precluded a Court in all cases from asking the soldier or sailor "to come forward with facts needful to a fair judgment", another principle

established in Boone v. Lightner, supra would be fatal to the Petitioner in this case. It is explained in the following language:

> "Regardless of whether defendant was under a duty to make a disclosure of his situation, once he undertook to do so, the significance alike of what his affidavit said and of what it omitted was to be judged by ordinary tests. One of these is that 'all evidence . . . is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted' ". (1229, 63 S. Ct.)

None of the affidavits submitted by the Petitioner, including those he made personally and the one made by his father, purported to set forth any facts, unless the bare generality that "the Petitioner's ability to prosecute his said suit is materially affected by his military service" (R. 9) can be considered a statement of fact.

In conclusion, we submit that the logic of the decision of the Supreme Court of Alabama that the Probate Court did not abuse its discretion in requiring Petitioner "to plead further or the cause be dismissed" is not subject to successful attack on any theory whatsoever. If there was ever a case which justified the denial of a stay under the Soldiers' and Sailors' Civil Relief Act, the case involved here is in that category, in our opinion.

Respectfully submitted,
James A. Simpson,
Attorney for Respondent
Mrs. Esther R. Wagner, as Executrix of the Estate of Zoe R. Martin, Deceased, and Individually.

Smyer and Smyer,
Lange, Simpson, Robinson and Somerville, of Counsel.

ARGUMENT IN SUPPORT OF RESPONDENT'S MOTION FOR CERTIORARI TO CORRECT A DIMINUTION OF THE RECORD.

The contention of the Respondent that the Supreme Court of Alabama took judicial notice of the Record of the Petition and proceeding of Dan S. Martin, father of Dan S. Martin, Jr., to probate an alleged lost will of the same decedent, William C. Martin, is heretofore set forth in this brief, and no further discussion of the point is made here, except to say that, in our opinion, the Supreme Court of Alabama, citing Catts v. Phillips, 217 Ala. 488, 117 So. 34, adopted and gave consideration to the Record of that proceeding as a part of the Record in the case of Dan S. Martin, Jr.

The Petition of Dan S. Martin, Sr. was filed on the 6th of August, 1942, over two years after the death of the decedent, William C. Martin.

The substance of the alleged lost will made the subject matter of that Petition is entirely different from that of the will sought to be established by Dan S. Martin, Jr. Dan S. Martin, in his Petition, averred that twenty-five per cent of the estate of the decedent, his brother, was willed to him; that the remaining seventy-five per cent was left by the alleged lost will to the widow, Zoe R. Martin, for her lifetime, and that after her death it was to be divided "among the heirs at law of the said testator, William C. Martin". In the Petition he names the heirs of the decedent as Zoe R. Martin, the widow, John D. Martin, another brother of the decedent, and himself. He supported this Petition by his own affidavit. It is significant that the will sought to be established by him in August, 1942, made no provision whatsoever for Dan

S. Martin, Jr. or any of the nieces and nephews of the decedent. It is also significant that the affidavit which he made in support of the Petition of Dan S. Martin, Jr., upon knowledge, information and belief, constitutes an oath to entirely different facts.

The solemn oath which he took in August, 1942, was made by him despite the fact that, if the affidavit made by Dan S. Martin, Jr. to the amendment to his Petition, filed on March 14, 1945, is to be accepted as true, the decedent before his death in July, 1940 had informed his own son, Dan S. Martin, Jr. that the will made the decedent's nephews and nieces the beneficiaries of the remainder interest in all the personal property.

If Dan S. Martin, Sr. himself saw the will and thereby knew its contents, he could, of course, have easily supplied the names of the subscribing witnesses thereto and cured any possible defect in his own Petition as well as that of Dan S. Martin, Jr. (the defect was the same in each). If he had no personal knowledge of the execution or contents of any will made by the decedent, then naturally his allegations and the affidavits that he made in support of both Petitions were necessarily upon information and belief. However, in any case the Judge of Probate, who had considered both Petitions, must have thought it remarkable that the information which he had in August, 1942, over two years after the death of William C. Martin, was entirely at variance with the information to which he made oath on January 15, 1945. Did the son, Dan S. Martin, Jr., during the period of over two years

intervening between the death of the decedent and the filing of the first Petition ever communicate to his father the substance of the solemn and important conversation between the decedent and the son prior to the decedent's death, in which the decedent disclosed that the son was to be one of the objects of his generosity? If he did not communicate such impressive information, then what was the cause or reason for his failure ever to acquaint his father with that fact? If he did communicate the result of the decedent's conversation to his father, then what is the explanation for the father's version of the contents of the alleged will set out in the Petition of August, 1942? Is it not strange that after the dismissal of the father's Petition by agreement on April 12, 1943, presumably after a satisfactory arrangement had been made with him in disposing of his claim, an entirely new claim should be presented in the name of the son? Those are questions which must have been in the mind of the Judge of Probate when he sought to determine in March, 1945, whether Dan S. Martin, Jr., his family and Attorney actually had knowledge and information upon which to base sufficient allegations (and consequent proof) of the contents and valid execution of a lost will of William C. Martin.

This circumstance upon which we shall no longer dwell, among many others, made it natural for the Probate Court in the exercise of a sound judicial discretion to look to the Petitioner "to come forward with facts needful to a fair judgment" (Boone v. Lightner, supra,

P. 1229, 63 S. Ct.) in determining whether Petitioner should be required at the outset to allege in his pleading facts sufficient to establish a right of action. The pertinency of the record in the case of Dan S. Martin, Sr., is therefore respectfully suggested.

Respectfully submitted,

James A. Simpson,
Attorney for Respondent

Mrs. Esther R. Wagner, as Executrix of the Estate of Zoe R. Martin, Deceased, and Individually.

Smyer and Smyer,
Lange, Simpson, Robinson and Somerville, of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 289

DAN S. MARTIN, JR., PETITIONER,

VS.

ESTHER R. WAGNER, AS EXECUTRIX OF THE ESTATE OF ZOE R. MARTIN, DECEASED, JOHN D. MARTIN AND DAN S. MARTIN, SR.,

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MOTION OF THE RESPONDENT ESTHER R. WAGNER, AS EXECUTRIX OF THE ESTATE OF ZOE R. MARTIN, DECEASED, AND INDIVIDUALLY, FOR A WRIT OF CERTIORARI TO CORRECT A DIMINUTION OF THE RECORD.

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The Respondent, Esther R. Wagner, as Executrix of the Estate of Zoe R. Martin, deceased, and individually, respectfully files and presents this motion for a writ of certiorari to correct a diminution of the record in this

cause, and in support thereof shows unto this Honorable Court the following:

The Supreme Court of the State of Alabama in its opinion rendered March 7, 1946, by which it affirmed the order and decree of the Probate Court of Jefferson County, Alabama, disallowing and dismissing the Petition of Dan S. Martin, Jr. to probate an alleged lost will of the decedent, William C. Martin, stated in part as follows:

> "Our attention has been directed to the record in this court in the matter of the estate of William C. Martin, deceased, petition of Dan S. Martin v. Zoe R. Martin to probate the lost will. See *Catts v. Phillips, 217 Ala. 488, 117 So. 34.* Taking that record and the record in this case together, we have the following situation. William C. Martin died July 18, 1940, but the petition in the case at bar was not filed until January 15, 1945, after the death of the widow Zoe Rhode Martin, for whose estate Esther Wagner has been appointed executrix. Prior to the death of Zoe Rhode Martin, Dan S. Martin filed a petition to probate the lost will of William C. Martin, deceased, and took an appeal from the final judgment or decree of the Probate Court of Jefferson County, denying, disallowing and dismissing the petition. The appeal was dismissed by agreement April 12, 1943. The same attorney represented both Dan S. Martin and Dan S. Martin, Jr., in their respective petitions." (R. 23).

The case of *Catts vs. Phillips,* supra, cited therein is one which deals with the principle of the taking of judicial notice of the record of another case in the same Court in appropriate cases, and in citing it the Supreme Court of Alabama, in the opinion of this respondent, un-

doubtedly meant to be understood as taking judicial notice of the Petition of Dan S. Martin to probate an alleged lost will of the same decedent, William C. Martin, the proceeding referred to in the above excerpt from the State Supreme Court opinion.

The record of the Supreme Court of Alabama pertaining to the said proceeding brought by Dan S. Martin in the Probate Court of Jefferson County, Alabama, and appealed by him to the Supreme Court of Alabama after an order and decree of the said Probate Court denying, disallowing and dismissing his petition to Probate the Alleged Lost Will, consists principally of the record of the organization of the said Probate Court; Petition to probate the lost will; order on filing a petition to probate the lost will; citation to Zoe Rhode Martin; interrogatories filed by Zoe R. Martin; order of continuance; motion to strike interrogatories; order on filing of motion to strike, order of continuance on said motion to strike; demurrer of Zoe R. Martin, as Administratrix of the estate of William C. Martin, deceased, and Zoe R. Martin, individually, an heir and distributee of said decedent, to the petition to probate the lost will; order of the Probate Court sustaining the said demurrer; an amendment to the Petition to probate the lost will; the final order and decree of the said Probate Court denying, disallowing and dismissing the Petition to probate the lost will; security for costs of appeal to the Supreme Court of Alabama; waiver of notice; order on filing appeal bond to the Supreme Court of Alabama; and final order and judgment of the Supreme Court of Alabama dismissing the appeal upon agreement of parties.

The said Petition of Dan S. Martin to probate the alleged lost will, filed August 6, 1942, is in words and figures as follows:

"THE STATE OF ALABAMA
JEFFERSON COUNTY

IN THE PROBATE COURT OF SAID COUNTY

NUMBER.....

IN RE: ESTATE OF WILLIAM C. MARTIN, DECEASED.

TO THE HONORABLE HENRY R. HOWZE AS JUDGE OF PROBATE OF SAID COUNTY:

The petition of the undersigned Dan S. Martin respectfully represents unto your Honor that the said William C. Martin, who was an inhabitant of said County at the time of his death departed this life in said County on the 18th day of July 1940 leaving a last will and testament duly signed and published by him, executed and attested in the manner required by law in which will your petitioner, as he verily believes, is named as a legatee or devisee. Your petitioner further avers that the said decedent, so far as petitioner knows and believes, left surviving him the following heirs or distributees, namely: Zoe R. Martin, over the age of 21 years and a resident of Birmingham, Alabama, the widow; John D. Martin over the age of 21 years, a brother in Eufaula Barbour County, Alabama; Dan S. Martin over the age of 21 years, a brother who resides in Birmingham, Alabama.

Petitioner further represents and shows unto your Honor that the said will of the decedent duly executed by him contained substantially the following provisions, namely:

(1) That all of testator's debts be paid.

(2) That twenty-five per cent of his estate was willed, devised and bequeathed to your petitioner, Dan S. Martin.

(3) That the remaining seventy-five per cent of his said estate was willed, devised and bequeathed to his widow, Zoe R. Martin for her lifetime; and that after her death the same was to be divided among the heirs at law of the said testator, William C. Martin.

"Petitioner further represents and shows unto your Honor that the said will has been lost or misplaced and that petitioner is unable to produce the original of said will; but there is set out hereinabove substantially the contents of said will as duly executed by the said William C. Martin.

Wherefore, Premises Considered, your petitioner prays that a day be set by your Honor for the hearing of this petition to probate said lost will; that due notice thereof as required by law be given to the widow and next of kin of said deceased; that upon the hearing of said petition on said day and upon proper proof as herein averred of the contents of said will and that the said will was duly executed; and that the same has been lost and cannot now be produced; and that substantially the contents of said will as finally executed be established by proper proof, the Court will admit the lost will to probate; and that such other proceedings, orders and decrees

may be had and made in the premises as may be requisite and proper to effectuate the due probate and recording of said lost will according to law.

(Signed) *Dan S. Martin*

Sworn to and subscribed before me this the *6th* day of August, 1942."

"*Branch Frazier*
Notary Public"

The demurrer of Zoe R. Martin, as Administratrix and Zoe R. Martin, individually, to the said Petition to Probate is in words and figures as follows:

"STATE OF ALABAMA,
JEFFERSON COUNTY.

IN RE: ESTATE OF WILLIAM C. MARTIN, deceased.

IN RE: PETITION TO PROBATE ALLEGED LAST WILL OF WILLIAM C. MARTIN

IN THE PROBATE COURT

Comes Zoe R. Martin, as administratrix of the estate of William C. Martin, deceased, and Zoe R. Martin, individually, an heir and distributee of said decedent, and demur to the petition heretofore filed in said cause by Dan S. Martin, whereby the said Dan S. Martin seeks under the terms of said petition to offer for Probate an alleged lost will of William C. Martin, and as grounds

for said demurrer set down and assign the following, separately and severally, to-wit:

1. For that it does not sufficiently appear that William C. Martin left a will at the time of his death.

2. For that said petition is vague, indefinite and uncertain.

3. For that said petition is legally insufficient.

4. For that no facts are therein set forth that William C. Martin died leaving a last will sufficient under the laws of the State of Alabama.

5. For that no sufficient facts are shown which constitute a legal execution of said alleged will.

6. For that it does not sufficiently appear that said alleged will was legally witnessed.

7. For that the names of the subscribing witnesses to said alleged will are not set forth in said petition.

8. For that said petition is legally insufficient in that the names of the subscribing witnesses to said alleged will are not therein set forth.

9. For that it does not sufficiently appear that the names of the subscribing witnesses were legally and sufficiently affixed upon said alleged will.

10. For aught that appears said alleged will was destroyed by the testator prior to his death.

11. For aught that appears said alleged will was revoked by the testator prior to his death.

12. For that said petition is insufficient to show that William C. Martin died leaving a legally sufficient and binding will; and said petition fails to disclose and identi-

fy the names and identities of any subscribing witnesses to said alleged will.

13. The averment of said petition that the last will and testament was executed and attested in the manner required by law is a mere conclusion of the pleader and not supported by sufficient allegations of fact contained therein.

LANGE, SIMPSON, BRANTLEY & ROBINSON
SMYER & SMYER

Attorneys for Zoe R. Martin, as admr'x and in her individual capacity."

The amendment to the said Petition to Probate is as follows:

"THE STATE OF ALABAMA
JEFFERSON COUNTY

IN THE PROBATE COURT OF SAID COUNTY

IN RE: ESTATE OF WILLIAM C. MARTIN, DECEASED.

TO THE HONORABLE HENRY R. HOWZE AS JUDGE OF PROBATE OF SAID COUNTY:

Now comes your petitioner, Dan S. Martin, proponent in the matter of petition to probate a lost will of the said William C. Martin, deceased, and by leave of Court first had and obtained hereby amends his said petition heretofore filed in said cause as follows: namely:

1. By inserting immediately after the words "lost or misplaced" where said words first appear together in

said petition the following words "or destroyed by some agency or act other than that of the said William C. Martin, deceased, the testator."

2. By adding immediately before the prayer and just after the words, "executed by the said William C. Martin" where same last appear before the words "Wherefore premises considered" the following:

"Proponent further avers that the said will was duly executed in writing in his lifetime, by the said William C. Martin, deceased, and signed by him in the presence of two witnesses who subscribed their names to said will. And your petitioner further avers that the said will was in existence after the death of the said William C. Martin, deceased."

(signed) *Dan S. Martin*

Sworn to and subscribed before me
this 23 day of September 1942.

/s/ Martha Bunyard
Notary Public

The final order and decree of the said Probate Court, denying, disallowing and dismissing the said petition is as follows:

"WILLIAM C. MARTIN, DECEASED, ESTATE OF, FINAL ORDER AND DECREE ON PETITION OF DAN S. MARTIN TO PROBATE AN ALLEGED LOST OR MISPLACED OR DESTROYED WILL OF SAID DECEDENT.

Case No. 12837

PROBATE COURT.

September 24, 1942

This day having been regularly appointed for hearing the original petition of Dan S. Martin heretofore filed in this Court for the probate of an alleged lost or misplaced will and testament of said deceased, came the petitioner Dan S. Martin and filed an amendment to the said petition which amendment, among other things, alleged that said purported will was either lost or misplaced or destroyed by some agency or act other than that of the said deceased. Came also Zoe R. Martin in her capacity as administratrix of said estate and in her individual capacity and as an heir and distributee of the estate of said decedent, and refiled all grounds of demurrer heretofore filed and assigned to the said original petition, and assigned each and every such ground separately and severally to the said petition as amended. The said demurrer being argued, submitted and heard in open Court and being considered by the Court, it is,

ORDERED, ADJUDGED AND DECREED that the said demurrer be and is sustained on grounds 7, 8 and 9 thereof, and overruled as to the other grounds. Thereupon, the said petitioner being given the opportunity further to amend said petition if he should desire so to do, but having in open Court declined to plead further, it is therefore, ORDERED, ADJUDGED AND DECREED that the said petition of Dan S. Martin, as amended, be and the same is hereby denied. And it is also further ordered that the costs of this proceeding be taxed against the said petitioner, for which let execution issue.

DONE this the 24th day of September, 1942.

H. R. Howze, Probate Judge."

This final order was entered September 24, 1942.

On April 12, 1943, the Supreme Court of Alabama

entered an order dismissing the said appeal of Dan S. Martin pursuant to an agreement of the parties to said cause filed with said Supreme Court. This agreement stipulates merely that the appeal should be dismissed by agreement of parties.

The exact words and figures of the portions of the record of said cause in the Supreme Court of Alabama, other than the portions set out above in full, are omitted from this motion because, in the belief and opinion of the movant, either they are immaterial to any issue involved in this case, or setting them out verbatim is unnecessary to a decision on this motion.

Wherefore, said respondent moves that a proper order be made by this Honorable Court causing a writ of certiorari to be issued to the Supreme Court of Alabama to effect the transmittal to this Honorable Court of the entire record of the Supreme Court of Alabama of the said Petition and proceeding brought by said Dan S. Martin, or such portions of the said record as this Court may deem material to the issues involved, in order that the diminution of the record in this cause, herein shown, may be corrected.

And said respondent respectfully moves that such other or further order be entered as this Honorable Court may deem proper in the premises.

Respectfully submitted,
James A. Simpson,
Attorney for the Respondent.
Esther R. Wagner, as Executrix
of the Estate of Zoe R. Martin,
Deceased, and individually.

Smyer and Smyer,
Lange, Simpson, Robinson and Somerville,
Of Counsel.

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, Arnold Drennen, Notary Public in and for said state At-Large personally appeared Reid B. Barnes, who deposes and says that he is a member of the law firm of Lange, Simpson, Robinson & Somerville, Birmingham, Alabama, of counsel for the Respondent, Esther R. Wagner, as executrix of the estate of Zoe R. Martin, deceased, and individually, and is duly authorized to make this affidavit; that the facts alleged in the foregoing Motion for Certiorari to Correct a Diminution of the Record, including the contents of the portions of the Record in the Supreme Court of Alabama designated in said motion, are true and correct to the best of his knowledge, information and belief.

Reid B. Barnes,

Of Counsel for the Respondent.

Sworn to and subscribed
before me this 23rd day
of August, 1946.

Arnold Drennen
Notary Public